



Comptroller General
of the United States

Washington, D.C. 20548

147765

Decision

Matter of: John L. Holland Enterprises

File: B-248200.2

Date: October 9, 1992

John L. Holland for the protester.
Paul M. Fisher, Esq., and Kimberly Frye, Esq., Department of the Navy, for the agency.
James M. Cunningham, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In the absence of evidence showing that the contracting agency unfairly created an incumbent contractor's advantage, agency has no obligation to equalize any advantage allegedly created by offeror's purchase of certain required equipment which was leased to government under prior contract, but which remains the property of the incumbent.

2. Contracting agency has discretion to determine whether or not to include a provision for progress payments in a solicitation.

DECISION

John L. Holland Enterprises (JLH) protests the terms of invitation for bids (IFB) No. N62470-92-B-0800, issued on March 24, 1992, for solid waste collection/disposal and miscellaneous related services, including the furnishing of waste containers, at the Norfolk Naval Shipyard, Portsmouth, Virginia. JLH contends that the incumbent contractor, Solid Waste Services, Inc., d/b/a J. P. Mascaro, has an improper competitive advantage, and that the IFB should include a provision allowing for either progress payments or advance payments.¹

¹JLH initially also protested that the initial term period (less than 1 year) of the contract was too short and argued that the period should be at least 1 year. In response, the Navy amended the IFB and provided that the initial term period would be for 1 year. Consequently, this ground of protest is academic.

We deny the protest.

The IFB, as amended, provided for a base year of services and up to 4 option years. The bulk of the services were required on a fixed-price, lump-sum basis, and a few other items were required on either an indefinite quantity basis, or on a specific work order basis. The IFB required the contractor to furnish specialized containers for the removal of sand grit waste incident to sandblasting operations, which were to be deployed at least within 60 calendar days after award.² Award was to be made to the responsive responsible low bidder. Seven bids were received on June 22; the Navy has not awarded a contract pending resolution of the protest.

JLH argues that Mascaro has received an unfair advantage under the IFB because of the requirement to provide sand grit waste containers; allegedly, only Mascaro had such equipment at the time of the bid submission, as the result of its performance as the incumbent contractor for these services. JLH further asserts that the Navy improperly purchased these containers for Mascaro under the prior contract by paying Mascaro excessive rent for them; thus, Mascaro, unlike its competitors, will not incur any expense for the containers required under the IFB.³

An incumbent contractor's acquisition and amortization under its prior contract of the equipment necessary to perform the proposed contract is a legitimate competitive advantage, which the government is not required to equalize unless there is evidence that the contracting agency unfairly created the incumbent's advantage. Contact Int'l Corp., B-241942, Mar. 12, 1991, 91-1 CPD ¶ 271. Here, the record establishes that the agency did not unfairly create the advantage which Mascaro may enjoy by virtue of having purchased the sand grit waste containers, modified for use by the Navy under the prior contract.

²In its initial protest, JLH also argued that there was insufficient time for non-incumbents to acquire and deploy these containers after award and before performance was to begin. In response, the Navy extended the time for the contractor to obtain these containers; therefore, this ground of protest is also academic.

³To the extent that JLH contests the propriety of the modification to the contract when JLH was required to acquire the containers, this is a matter of the administration of an existing contract, not subject to our Office's bid protest jurisdiction. See 4 C.F.R. § 21.3(m)(1) (1992); McDermott Shipyards, Div. of McDermott, Inc., B-237449, Jan. 29, 1990, 90-1 CPD ¶ 121.

The Navy states that during the prior contract with Mascaro a change in the state of Virginia's landfill requirements prompted the Navy to order additional sand grit waste containers, which needed to be "modified for specialized handling"⁴ in order to support the Navy's sandblast operations. These additional containers were purchased under a contract modification which directed Mascaro to purchase, and to hold title to, the containers. The containers were rented by the Navy for \$194.24 per month per container. The contracting officer determined that this monthly rental figure was fair and reasonable and included "shipping costs, labor and material to paint and maintain the containers, labor to install pad eyes . . . and labor to adapt the containers for use elsewhere upon contract completion." Consequently, the Navy asserts that its rental payments to Mascaro did not constitute purchase of the modified containers for the Navy's use.

Mascaro, not the Navy, has title to the containers which the Navy ordered Mascaro to purchase under the prior contract. There is no credible evidence that the Navy's rental payments to Mascaro were excessive in relation to the extra costs which Mascaro incurred in complying with the Navy's requests to paint and maintain the containers, to install pad eyes, and to adapt the containers for use elsewhere upon completion. Consequently, we find that the Navy did not unfairly create any advantage which Mascaro may enjoy under this IFB, and we deny this ground of protest.

JLH also asserts that the IFB should contain a provision authorizing either progress or advance payments. JLH argues that if the Navy "truly wants and intends to have bids on this contract" then it should provide for either of these payments. The Navy argues that it did not abuse its discretion in deciding not to provide for either advance or progress payments under this IFB.


31 U.S.C. § 3324(a) (1988) generally prohibits advance payments unless where authorized by a specific appropriation or other law. See Advance Payment for Maintenance of Equip., B-219074, July 26, 1985, 85-2 CPD ¶ 97. Further, agencies are directed to "authorize advance payments sparingly" even when the payments are otherwise authorized by law. Federal Acquisition Regulation (FAR) § 32.402(b) (1990). While the protester believes that an advance payment provision would enhance competition, it has provided no evidence that they are authorized here. With respect to progress payments, the contracting officer generally has the

⁴The Navy states that the containers were modified by the installation of "pad eyes which are certified to handle a 25,000 pound load."

discretion to determine whether and under what terms a provision for progress payments should be included in an IFB. Eastern Technical Enters., Inc., B-235880, Sept. 28, 1989, 89-2 CPD ¶ 282.

We find no basis to conclude that the Navy abused its discretion by not including progress payment provisions in the IFB. Seven bids were received under the IFB; thus, competition was achieved despite the absence of a progress payment provision. Further, as noted by the Navy, the IFB provides for periodic partial payments, on a monthly basis, for completed work, thereby affording the contractor a measure of payment as work progresses.

The protest is denied.


for James F. Hinchman
General Counsel